No. 82-1167

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA,
Petitioner,

vs.

BRADLEY THOMAS JACOBSEN and
DONNA MARIE JACOBSEN
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers is a District of Columbia non-profit corporation with a membership comprised of more than 2700 lawyers, including representatives of every state. *Amicus* was founded 25 years ago to promote study and research in the field of Criminal Defense Law, to disseminate and advance the knowledge of the law in the field of Criminal Defense Practice and to encourage the integrity, independence and expertise of the defense lawyer. Among N.A.C.D.L.'s stated objectives is the promotion of proper administration of criminal justice. N.A.C.D.L. consequently concerns itself with the protection of individual rights in the improvement of the criminal law, its practices and procedures.

SUMMARY OF ARGUMENT

Unless some exigency or other exception to the warrant requirement exists, law enforcement agents must obtain a warrant before conducting a field test upon a bag of unidentified white powder. The standard operating procedure utilized by the police in conducting the field test here went beyond the scope of the examination for damaged goods by the common carrier, and included opening the bag, seizing some of the contents and destroying the seized contents by chemical analysis. *Amicus* asks the Court to recognize that such tests intrude upon protected Fourth Amendment interests and may not, therefore, be used upon unidentified substances without conforming to the Fourth Amendment's warrant requirement.

ARGUMENT

I

GOVERNMENT PARTICIPATION IN AN OTHERWISE PRIVATE SEARCH THAT EXCEEDS THE SCOPE OF THAT SEARCH MUST COMPLY WITH FOURTH AMENDMENT CRITERIA

Since 1921, the law has been clear that the fruits of a private search are not protected by the Fourth Amendment to the Constitution. *Burdeau* v. *McDowell*, 256 U.S. 465 (1921). However, an inspection and examination by government agents of protected areas that begins where a private search leaves off does invoke the scrutiny of the Fourth Amendment. To the extent that this additional activity constitutes a "search" or "seizure" within the meaning of the Fourth Amendment, it must be subject to the same rigorous Constitutional standards as a search initiated by government agents. To hold otherwise would erase the bright line which currently guides government agents, and would create yet another legal quagmire which requires case by case analysis of how deeply the Government can invade the private domain after an initial intrusion by a private party failed to satisfy the needs or curiosity of law enforcement officials. In addition to creating a murky area where the waters are now clear, the opportunities for abuse and subterfuge are manifest.

II

THE ACTIONS OF THE DEA AGENTS EXCEEDED THOSE OF THE FEDERAL EXPRESS EMPLOYEES AND CONSTITUTED A SEIZURE AND SEARCH

Amicus believes that the law enforcement agents exceeded the scope of the private search. Although the agents initially retraced the steps taken by the private parties by removing the plastic bags from the package, they did not stop there. The agents proceeded to open up the plastic bags, seize some of the contents, and then destroy a portion of the contents by subjecting it to chemical analysis. The entire process had no purpose other than to discover information which was otherwise secreted or hidden from public knowledge. The Court of Appeals for the Sixth Circuit in *United States* v. *Rodriquez,* 596 F.2d 169, 175 (6th Cir. 1979) found similar actions by government agents to be a search.

Support for the proposition that the field test was a search can also be found in those cases that discuss the use of mechanical and electronic aids to the police in the Fourth Amendment context. For instance, the use of magnetometers at airports has been called a search, justified without a warrant for reasons not relevant to this case, even though they can tell nothing about the inside of a person's luggage except that it consists of something metallic. *United States* v. *Epperson,* 454 F.2d 769 (4th Cir.), *cert. denied,* 406 U.S. 947 (1972). Likewise, the use of an X-ray machine which reveals nothing more than the shape, size, and density of an item within a container has also been held to be a search. *United States* v. *Albarado,* 495 F.2d 799 (2nd Cir. 1974). Even the use of ultraviolet light to reveal the presence of fluorescent powder on a suspect's hand has been recognized as a search. *United States* v. *Kenaan,* 496 F.2d 181, 182 (1st Cir. 1974). All of these devices are less intrusive than the chemical analysis involved in a field test since none requires the opening of a container or a physical seizure and destruction of any property.

Not all aids to the police will make an examination of property a search. The Court recently declared that the use of a dog to sniff the exterior of a suspect container to detect the presence of drugs within was not a search within the meaning of the Fourth Amendment. *United States* v. *Place*, ____U.S.____, 103 S.Ct ____, 77 L.Ed.2d 110, 121 (1983). The Court relied on the fact that the dog does not invade the suspect's property, he simply detects those odors that emanate into the public domain. Likewise, the use of a "beeper" to track an automobile is not a search. *United States* v. *Knotts*, ____U.S.____, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983). Like the dog, this device invades nothing. It simply performs electronically the task of noting the whereabouts of an automobile that any member of the public could perform. Chemical tests, however, do far more than merely extend the natural senses of the agents. The chemical composition of a substance is totally hidden from public knowledge and cannot be determined by an individual's natural senses. The chemical reactive process is used to unlock its secret composition and must be acknowledged as a search.

III

RESPONDENTS HAD A REASONABLE EXPECTATION OF PRIVACY IN THE PACKAGE AND IN THE IDENTITY OF ITS CONTENTS THAT WAS NOT EXTINGUISHED BY THE PRIVATE SEARCH CONDUCTED BY THE FEDERAL EXPRESS EMPLOYEE

Not every search by government agents is subject to Fourth Amendment scrutiny. In the 1967 landmark decision, *Katz* v. *United States*, 389 U.S. 347 (1967), this Court rejected the traditional physical barrier as a determinent of what areas of privacy are protected by the Fourth Amendment. Thereafter, the Fourth Amendment has been applied to those searches that invaded areas in which a person had a reasonable expectation of privacy. Such an expectation must be an actual one as well as one that society is prepared to recognize. *Smith* v. *Maryland*, 442 U.S. 735 (1979).

There can be no doubt that the sender of the package in this case and Respondents expected the contents of the package to remain free from public observation when it was placed in the hands of the common carrier. Moreover, the fact that the package was apparently damaged and then inspected to determine the extent of the damage did not wholly extinguish that expectation. Respondents had every right to expect, and society should so recognize, that the police would not be called upon to perform a more intrusive examination of their property than that conducted by the common carrier. This includes subjecting it to chemical analysis.[1]

The validity of this expectation was recognized in *Walter* v. *United States*, 447 U.S. 649 (1980). In *Walter*, examination by government agents of films which were within containers that were labeled with a description of their contents was held to be a search. Respondents placed no labels on their plastic bags and, in fact, did nothing to distinguish this white powder from any other white powder. Nor did they otherwise expose the contents of the package or powder to public scrutiny. Under these circumstances, Respondents' expectation of privacy was certainly reasonable.

Citizens living under our Constitutional government should be able to expect that the contents of a securely bound package containing an outwardly nondescript substance placed with a commercial mail carrier will remain private and free from police seizures or searches absent a warrant based upon probable cause or an authorized exception to the warrant

[1] The government asserts that the field test was incapable of revealing any information about an innocent substance, but was only capable of disclosing whether the substance was, in fact, cocaine. Petitioner's Brief at p. 14, n. 7. From this premise, the government bases its entire argument that the Respondents had no expectation of privacy in the contents of the bags. However, the government's assertion is without any factual basis and relies wholly upon an undated, DEA internal memorandum, the accuracy of which has never been scrutinized. This memorandum is not a part of the record in this case. This Court should not decide important Constitutional issues based upon facts not introduced into evidence or tested by the adversarial process.

requirement. If the circumstances of Respondents' case suggested to DEA agents that the package contained an illegal drug, and not an innocent substance, then the government should have detained the package long enough to seek a warrant to search it further.

As Justice Brandeis noted in *Olmstead* v. *United States*, 277 U.S. 438 (1928), the Fourth Amendment confers the right to be let alone which implies the right not to have one's repose and possessions disturbed. In Respondents' case, the police opened up the plastic bags and seized a portion of its contents. This invasion violated the security of Respondents' property and should be scrutinized by Fourth Amendment standards. In addition, the testing destroyed an unknown amount of Respondents' property, the value of which was totally unknown to the government.

IV

THE WARRANTLESS SEIZURE OR SEARCH OF THE SUBSTANCE BY THE DEA AGENTS DID NOT FALL WITHIN ANY RECOGNIZED EXCEPTION TO THE WARRANT REQUIREMENT

If the actions of the police constituted either a seizure or a search of an area in which Respondents had a reasonable expectation of privacy, then those actions were unlawful unless they fell within one of the familiar exceptions to the warrant requirement.

Clearly, there were no "exigent" circumstances to justify a warrantless search, nor does the Government claim any. There is no evidence that "time was of the essence", or that a simple detention of the package pending the issuance of a warrant would have frustrated law enforcement objectives, even if, prior to the field test, probable cause were present.[2]

[2] The government agents could have used the less intrusive "canine sniff" to develop probable cause. *See United States* v. *Place*, ____ U.S. ____, 103 S. Ct. ____, 77 L.Ed.2d 110, 121 (1983).

The rationale set forth in *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971), and *Texas* v. *Brown*, ____U.S.____, 103 S.Ct. ____, 75 L.Ed.2d 502 (1983), does not support a finding of plain view under the facts of this case. Here, the incriminating nature of the substance was not immediately apparent either from the powder itself, or the packaging, which is why the police needed to conduct the field test.[3] It was, to the observer, a non-descript white powder packaged as any powder-like substance might be for delivery through the mails. Unlike the balloons in *Texas* v. *Brown*, there was no evidence that the packaging of the powder substance in this case was a distinctive characteristic of the manner in which narcotics are commonly packaged.

Furthermore, the discovery of the chemical composition of the substance was not inadvertent, but intentional. The agents obviously suspected that the substance was cocaine, and accordingly, tested specifically for that substance.

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[3] This case is readily distinguishable from the facts in *United States* v. *Rodriguez*, *supra*. There, the carrier had observed the sender to "appear nervous", hesitate when asked to note the contents of the package on the freight bill, and be "emphatic" that the package be held at the Detroit office for pick-up. In addition, neither the address of the sender nor addressee could be confirmed. In the instant case, at the time of the field test nothing was known about the sender, his habits or movements, nor those of the addressee. Further, in *Rodriguez*, the Defendant had listed the contents of the package as "film equipment" which was belied by the carrier when the package was held up and shaken. Thus, when the *Rodriguez* package was opened, revealing its contents, bags of brown powder covered with talcum, it was apparent not only that the sender had lied, which made his actions even more incriminating, but that he had used a substance commonly used by drug shippers to deceive detector dogs as well as the police. These factors led the Court to conclude that the nature of the substance as contraband was immediately apparent. In the case at bar none of these elements were present only an innocuous white powder. To hold that this, standing alone, would constitute facts sufficient to make its nature "immediately apparent" would be to arbitrarily remove all powdery substances from the protection of the Fourth Amendment *per se*, a result inconsistent with logic as well as the historic and philosophic tenets underlying the Amendment's long history.

There exists in the law today no other conceivable exception to the warrant requirement to justify this search. Therefore, the failure of the government agents to procure a warrant prior to opening the plastic containers, extracting some of the contents and destroying it by chemically examining its composition makes the entire process both an unlawful search and seizure.

CONCLUSION

For these reasons and the reasons stated in the petitioner's brief, *Amicus* respectfully submits that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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ON BRIEF